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No. 90-1247

In the Supreme Court of the United States

OCTOBER TERM, 1990

CITY OF SPOKANE and PETER G. FORTIN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the City of Spokane is barred from taxing the bingo revenues of the Inland National Chapter of the American National Red Cross because, as an instrumentality of the United States, the Red Cross is immune from local taxation.

2. Whether the City must refund the taxes on bingo revenues paid by the Inland National Chapter of the Red Cross.

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OPINIONS BELOW

The opinion of the court of appeals, as amended (Pet. App. B63 - B75), is reported at 918 F.2d 84. The opinion of the district court (Pet. App. A27 - A48) is reported at 734 F. Supp. 919.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1990, and an order amending the judgment was entered on November 27, 1990. The petition for a writ of certiorari was filed on January 29, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The State of Washington authorizes charitable organizations, including specifically the American National Red Cross (the Red Cross), to conduct bingo games and various other types of "fund-raising" activities involving gambling. Wash. Rev. Code Ann. § 9.46.0311 (1988); see *id.* § 9.46.0209. The State also authorizes its local governments to tax the proceeds of those charitable gambling activities. *Id.* § 9.46.110. Since 1982, the City of Spokane has levied a gambling tax upon the bingo revenues of the Inland National Chapter of the Red Cross (INC).

In February of 1986, the INC requested a refund of all gambling taxes it had paid. The request was denied. The United States then brought this action to obtain the refund, with interest, and to enjoin the further assessment of such taxes. On cross motions for summary judgment, the district court determined that the INC was an instrumentality of the United States under 36 U.S.C. 3 and that imposition of the City's tax on INC bingo revenues violated the Supremacy Clause of the United States Constitution. The district court therefore entered a judgment requiring the City to refund the taxes paid by INC within the six-year period preceding the filing of the complaint in this action, together with prejudgment interest from the date of the refund demand made by INC. Pet. App. A27 - A48; see 28 U.S.C. 2415. The district court further directed the City to cease imposing its tax on the INC. Pet. App. A45.

The court of appeals affirmed,[1] noting that "[o]ne of the hoariest principles of federal-state governmental relations

[1] The court of appeals' opinion of October 31, 1990, left it unclear whether the City was required to refund taxes paid after November 21, 1982 (as the district court had ordered, see Pet. App. A48), or after February 28, 1986 (the date that the INC had made its refund demand). See Pet. App. B61. On November 27, 1990, the Court amended its opinion to clarify that the former was intended. See Pet. App. B75.

is that no state can impose a tax upon an instrumentality of the United States Government." Pet. App. B68, citing *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819). The court held that "there can be no doubt that" the Red Cross is an instrumentality of the United States (Pet. App. B69):

> The Supreme Court made that clear in *Department of Employment* v. *United States*, 385 U.S. 355, 358, 87 S. Ct. 464, 467, 17 L.Ed.2d 414 (1966) where it said, "[W]e hold that the Red Cross is an instrumentality of the United States for purposes of immunity from state taxation levied on its operations, and that this immunity has not been waived by congressional enactment."

The court of appeals then rejected the City's contention that, even though the Red Cross is a federal instrumentality, it has no immunity from taxation for the type of activities conducted here. The court observed that (Pet. App. B70):

> There can be no doubt that the Red Cross can engage in activities designed to earn money. In fact, because it is not, for the most part, funded with tax dollars, it must engage in many fund raising activities if it is to survive. While we do not suggest that the Red Cross can engage in illegal activies in pursuit of its goals, there is nothing illegal about the gambling activities the INC is engaged in here.

The court of appeals thus concluded that the City could not impose its tax on the INC.

The court of appeals also held that the City must refund the taxes it had collected from the INC during the six-year period of the applicable statute of limitations. Applying the three-part test described in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-107 (1971), the court rejected the City's con-

tention that the decision striking down this tax should not be applied "retroactively" (Pet. App. B74):

> We overrule no precedent here and we do not decide an issue of first impression. * * * [O]ur determination * * * proceeds from a long, if sometimes wavy, line of Supreme Court authority. This alone indicates that retroactivity is required. *See Ashland Oil, Inc.* v. *Caryl*, ____ U.S. ____, 110 S. Ct. 3202, 3205, 111 L.Ed.2d 734 (1990) (per curiam).

Moreover, the court noted, "no inequity results from retroactive application. It is true that the City may already have used the tax money, but at the very least it should have entertained the gravest doubts about its right to collect the tax in the first place." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and is not in conflict with any decision of this Court or any other court of appeals. Further review by this Court is therefore not warranted.

1. The City contends (Pet. 12, 18-20) that the decision below "infringes upon the constitutional authority of a sovereign state" to regulate gambling within its borders. The City, however, misapprehends the grounds on which this case was decided. In the courts below, the authority of the State of Washington to control gambling activities within its territorial jurisdiction was not disputed—to the contrary, such authority was assumed to exist (Pet. App. B70).[2] The question addressed and decided in the lower courts was whether the State, having made bingo a lawful activity,

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[2] The decisions that petitioners cite (Pet. 14-17) concerning a state's authority over gambling activities (*e.g.*, *Douglas* v. *Kentucky*, 168 U.S. 488 (1897)) are thus not relevant to the question presented in this case.

could tax the bingo revenues earned by the Red Cross and the INC, its local chapter. The court of appeals correctly held (*ibid.*) that, as an instrumentality of the United States created under authority of federal law (36 U.S.C. 3), the Red Cross is not subject to such state taxation.

This Court held in *Department of Employment* v. *United States*, 385 U.S. 355, 358 (1966), that "the Red Cross is an instrumentality of the United States for purposes of immunity from state taxation levied on its operations * * *." Petitioners do not dispute that, as an instrumentality of the United States, the Red Cross is ordinarily immune from state taxation (Pet. App. A40). Instead, petitioners claim (Pet. 18-20) that state-authorized bingo games are not within the scope of the activities authorized by Congress for the Red Cross and therefore fall outside the immunity from taxation afforded to the Red Cross as a federal instrumentality.

The court of appeals correctly rejected this contention (Pet. App. B68-B70). Congress has chosen not to finance the far-flung operations of the Red Cross entirely from the public fisc. Instead, the charitable and public services provided by the Red Cross are financed primarily through its private fund-raising activities (Pet. App. A32, B70). The bingo games that charitable entities are authorized to conduct are precisely for such "fund raising" purposes, as the Washington tax legislation expressly recognizes. Wash. Rev. Code Ann. § 9.46.0311 (1988). As the court of appeals concluded (Pet. App. B70), the fund-raising activities of the INC, including the bingo games that have been authorized by the State, fall squarely within the scope of the charitable mission of the Red Cross as established by Congress. They also thus fall within the scope of the immunity from state taxation afforded to the Red Cross as a federal instrumentality. There is no conflict among the courts of appeals to warrant further review of the decision below.

2. The City further contends (Pet. 22-24) that the requirement that it refund its unconstitutional taxes to the INC gives an impermissibly "retroactive" effect to the decision. The City asserts (Pet. 22) that, under the standards adopted by this Court in *Chevron Oil Co.* v. *Huson*, 404 U.S. at 106-107, the decision in this case should not be applied retroactively because it presents "an issue of first impression whose resolution was not clearly foreshadowed." *Id.* at 106. As the court of appeals correctly pointed out, however, the decision in this case rests firmly on this Court's precedent and does not present an issue of first impression (Pet. App. B74). See *American Trucking Ass'n* v. *Smith*, 110 S. Ct. 2323, 2331 (1990) (opinion of O'Connor, J.); *Department of Employment* v. *United States*, 385 U.S. at 357 (affirming judgment that required state to refund taxes assessed against the Red Cross). See also *McKesson Corp.* v. *Division of Alchoholic Beverages*, 110 S. Ct. 2238 (1990). Moreover, the decision is not truly "retroactive" in any event, for it merely requires the City to disgorge the revenues it has unconstitutionally collected to the taxpayer who prevailed in the *first* action challenging the tax. See *American Trucking Ass'n* v. *Smith*, 110 S. Ct. at 2343 (Scalia, J., concurring); *id.* at 2349 (Stevens, J., dissenting).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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